IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1448 of 1987
with
CIVIL APPLICATION No 11398 of 2001

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE K.A.PUJ

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

HANSKUMAR SHMAJI SHAH

Versus

ANIL BHATNAGR

Appearance:
1. Special Civil Application No. 1448 of 1987
MR MJ THAKORE for Petitioner No. 1
MR DN PATEL for Respondent No. 1-4

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE K.A.PUJ

Date of decision: 24/06/2002

ORAL JUDGEMENT

(Per : MR.JUSTICE M.S.SHAH)

In this petition under Article 226 of the Constitution, the petitioner who had imported Scalp Vein

sets from Japan at the Kandla Port in March/April, 1986 has challenged five show cause notices dated 6.9.1986 and the five consequential orders dated 6.3.1987 passed by the Deputy Collector of Customs, Kandla (and also the detention order dated 10.3.1987 passed by the Assistant Collector of Customs, Kandla) whereby the respondent authorities held that the Scalp Vein sets imported by the petitioner were not Intravenous Canulae and Tubing for long term use as per entry No. 19 in Schedule B of the Customs Tariff Act, 1975.

2. The controversy arising in this petition is whether Scale Vein sets imported by the petitioner were covered by the aforesaid entry No. 19 of the Schedule B of the Customs Tariff Act, 1975 which read as under :-

"Intravenous Canulae and tubing for long term use."

The case of the petitioner is that in Appendix 6 of the Export and Import Policy for the year 1985-88 covering the period in question also there was an identical entry being item No. 21 reading as under :-

"Intravenous canulae and tubing (for long term use).

and that the Chief Controller of Imports and Exports had in his letter dated 11.3.1986 (Annexure "J") held that "import of infusion sets ... ... butterfly needles for intravenous infusion ... ... is covered under entry No. 21 of List 2 of Appendix 6 of the Import & Export Policy, 1985-88 (Vol. 1)".

Reliance is also placed on the certificate dated 16.1.1987 of the Assistant Director General (Medical), New Delhi stating that Scalp Vein set is eligible to be considered as Intravenous Canula and Tubing for long term use.

Reliance is place placed on the literature of manufacturer Hakko Shoji Co. Ltd. of Japan and their certificate dated 2.10.1985 (Annexure "X") that Hakko Brand Scalp Vein set and Hakko Brand Winged Infusion set are meant for long term intravenous infusion of fluids and liquid medicines and maximum indwelling duration can be used for 2-3 days at a time.

The petitioner has also relied upon the certificate issued by Surgeons and Physicians of Calcutta and Bombay that Scale Vein set is an intravenous Canula

which can be kept in a vien and used for a long time to administer medicines or fluids.

3. At the hearing of this petition, apart from relying on the aforesaid material, the learned counsel for the petitioner has also relied on the decision of the Madras High Court in Unival Surgical Traders vs. Union of India, 1999 (114) ELT 811 holding that Scalp Vein sets are nothing but Intravenous Canulae and Tubing for long term use and eligible to the benefits of importation under OGL and also for duty exemption under Notification No. 208/81. The learned counsel for the petitioner has also relied on the decision of the New Delhi Bench of the CEGAT in Life Line Surgical Traders vs. Collector of Customs, 1988(33) ELT 699 and of the Madras Bench of the CEGAT in Unival Surgical Traders vs. Collector, 1988 (37) ELT 58.

4. On the other hand, Mr DN Patel, learned senior standing counsel for the Union of India has opposed the petition and submitted that the question whether Scalp Vein sets are covered by the entry "Intravenous Canulae and Tubing (for long term use)" is a question of fact or at the highest a mixed question of law and fact which the Deputy Collector has already decided against the petitioner and, therefore, the petitioner can at the most be required to avail of the alternative remedy of challenging the said order in appeal. Mr Patel has also vehemently submitted that the Director General of Health Services had given his opinion dated 6.6.1985 that Scalp Vein Infusion set is not the same thing as Intravenous Canulae and Tubing for long term use and that, therefore, the petitioner may not be granted any relief in this petition other than being relegated to the alternative remedy.

5. Before dealing with the rival submissions, it is necessary to refer to the interim order which this Court passed on 30.4.1987 after hearing the learned counsel for the parties. In the said order, this Court referred to the clarification dated 16.1.1987 given by the Assistant Director of Health Services that the Scalp Vein sets in question should be considered as Intravenous Canulae and Tubing for long term use and that the Chief Controller of Import and Export had also held that Scale Vein set falls within the expression "Intravenous Canulae and tubing for long term use". The Court was, therefore, of the prima facie view that there was a prima facie case of want of jurisdiction and that a prima facie case to the effect that the goods are not liable for custom duty was made out and there was no point in driving the parties to the

alternative remedy of filing an appeal and that in exceptional cases of this nature, the Court has power to interfere and to safeguard the interest of the parties concerned. The Court considered the present case to be a fit one in which the Court had to interfere and grant the interim stay prayed for, particularly in view of the fact that the equipment would have become useless after certain period mentioned in the package itself. Of course, the interest of the customs would also to be safeguarded. Hence, while directing the respondent authorities to release the goods, this Court imposed the following conditions on the petitioner:-

(i) The petitioner must file an affidavit of undertaking guaranteeing the payment of customs duty claimed, in case he fails in this petition.

(ii) The petitioner must also file an affidavit of undertaking that he will not alienate or encumber henceforth any of his immoveable properties pending disposal of this petition.

(iii) The petitioner shall furnish a bank guarantee for a sum of Rs. 4,00,000/- out of the sale proceeds of the goods, which were permitted to be cleared by the interim order.

At the request of the revenue, this Court also stayed the operation of the interim order dated 30.4.1987 for two weeks in order to enable the respondent authorities for taking the matter to the Supreme Court.

6. At the hearing today, we are informed by Mr MJ Thakore for the petitioner that pursuant to the aforesaid interim order, the petitioner was permitted to clear the goods and the petitioner also gave a bank guarantee for a sum of Rs. 4,00,000/- and also the undertakings on affidavit as per the conditions stipulated in the above interim order. Mr Thakore, however, makes a grievance that even though the present petition was pending, the respondent authorities invoked the bank guarantee and got the same encashed.

Mr DN Patel, learned counsel for the respondents is not in a position to confirm or deny the above statement.

7. First taking up the contention urged on behalf of

the respondents about availability of alternative remedy, we are not inclined to accept the said contention for the simple reason that this aspect was already urged on behalf of the respondents at the time of admission of the petition way back in the year 1987 and this Court rejected the said contention in the peculiar facts and circumstances of the case including the fact that the Chief Controller of Imports and Exports had held the Scalp Vein set to be covered by the entry "Intravenous Canulae and Tubing for long term basis" and also in view of the subsequent clarification dated 16.1.1987 given by the Assistant Direct of Health Services that the above goods were covered by the above entry. When the petition has remained pending before this Court since 1987, it would not be fair to relegate the petitioner now to the alternative remedy. Secondly, in the intervening period, the Madras High Court has already pronounced on the identical controversy raised herein and held in favour of the assessee. In this view of the matter, we overrule the preliminary contention raised by Mr Patel for the revenue that the petition should not be entertained on the ground of availability of an alternative remedy.

8. Coming to the merits of the matter, the entry "Intravenous Canulae and Tubing for long term use" may be broken up in three parts -

(i) Intravenous,
(ii) Canulae and
(iii) for long term use.

Scale Vein sets (which according to the petitioner, are also popularly called "butterfly needles") are being used in the hospitals for administering intravenous medicines and fluids into the vein of the patient for a long time when the patient is treated as an indoor patient in a hospital so that the patient is not required to be subjected to frequent prickings for administering medicines and fluids. Hence, there is no controversy about the Scalp Vein sets being intravenous.

As far as the expression "canulae" is concerned, reliance is placed on the following meaning contained in the Shorter Oxford Dictionary :-

A tubular instrument introduced in a cavity or tumor in order to allow fluid to escape, Hence "cannular" "tubular".

Since injectible medicines, salines and other

fluids are inserted in the vein of the patient through this canulae or butterfly needle, it also satisfies the second part of the entry.

9. It appears that the real and serious controversy is about the third part of the entry whether Scalp Vein sets have a long term use. Similar controversy was raised before the Madras High Court and it was contended on behalf of the revenue that since the scalp vein set is disposable and it could be thrown away after one use, it is not meant for long term use. Negativing the said contention, the Madras High Court held that long term use means that a needle must be capable of being kept in the vein for a long term and not that it should be repeatedly used. We see no reason to take a different view from the one taken by the Madras High Court in Unival Surgical Traders vs. Union of India, 1999 (114) ELT 811.

10. The opinion dated 6.6.1985 of the Director of Health Services relied upon by the revenue does not contain any reason whatsoever. The contention on behalf of the revenue that it is a single use needle is misconceived. The real question is for how long such Scalp Vein set needle can remain in the vein of the patient. Since the Scale Vein sets are used for administering injectible medicines, fluids, etc. during the hospitalization of the patient, the needle is kept in the vein for a long term, may be for days, in order to save the patient from the pain of being pricked time and again. If such Scalp Vein set needle, once inserted in the vien and kept inside for administering medicines and/or fluids, is removed after 2 to 3 days and thereafter it is disposed of, and not used again, it cannot be said that it is a single use needle and, therefore, not a multiple use needle and, therefore, not meant for long term use. Long term use has obviously reference to the number of hours or days and not to the number of times it could be inserted in the vien. Again the expression "long term use" has to be construed in the context of use of intravenous needles. The ordinary needles are used for pricking the vein and one time administration of medicine which lasts for a few seconds. On the other hand, Scalp Vein set needle may be kept in the vien for two to three days for repeated administration of medicines and fluids in the vien. Hence, use of the needle for such a length of time has to be considered to be long term use.

11. In above view of the matter, we find that there is considerable substance in the contention urged on behalf of the petitioner that Scalp Vein sets would fall

within the entry "Intravenous Canulae and Tubing for long term use" which entry is to be found in the list of life saving devices.

12. In view of the above discussion, we allow the petition. The impugned orders dated 6.3.1987 and the impugned notices dated 6.9.1986 giving rise to the said orders passed by the Deputy Collector of Customs at Annexures "A" colly. and "B" colly. are hereby quashed and set aside. The impugned detention order and the detention notice at Annexures "O" and "P" dated 10.3.1987 are also hereby quashed and set aside. The petitioner is relieved from the undertaking filed pursuant to the interim order dated 30.4.1987 of this Court. The respondents shall refund the amount of customs duty, if any, recovered from the petitioner pursuant to the aforesaid impugned orders which are quashed.

13. Civil Application No. 11398 of 2001 is allowed. The amount obtained by the respondents by encashing the bank guarantee for a sum of Rs.4,00,000/- (as stated in the application) shall be refunded to the petitioner within two months from the date of receipt of the writ of this Court.

14. Rule is made absolute to the aforesaid extent with no order as to costs.

(M.S. Shah, J.)

(K.A. Puj, J.)

sundar/-